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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ARCHIE LEE PARKS, JR., Defendant and Appellant.	F056308 (Super. Ct. No. F07908326) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Ralph L. Putnam, Judge.

Verona Swanigan, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Marcia A. Fay, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant appeals from his conviction of one count of assault with intent to commit rape (Pen. Code § 220).[1] He contends he was denied effective assistance of counsel because (1) his trial attorney failed to introduce evidence of defendant's mental disorder and to request jury instructions concerning the effect of such a disorder on the specific intent element of the offense, and (2) his trial attorney failed to move to admit statements made by the victim and to exclude statements made by defendant. He also contends the court abused its discretion by admitting evidence of defendant's prior sexual offenses. We find no error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 7, 2006, defendant and Michelle F. were patients at the Psychiatric Assessment Center for Treatment (PACT) unit, which was part of University Medical Center. The PACT unit provided assessment, stabilization, and referral services on an emergency basis to persons with mental health concerns. Admission to the unit did not necessarily mean the person admitted was mentally ill. Michelle, who was 25 years old at the time of trial, is developmentally delayed and emotionally disturbed, and operates socially at a 10- or 12-year-old level. On December 7, 2006, Michelle was sitting in the TV room in the PACT unit watching TV when defendant pulled a chair up next to her, sat down, leaned in close to her, and gave her a bracelet. She felt uncomfortable, and got up and went to the bathroom. The bathroom door did not lock; only one person was allowed in it at a time. As Michelle was washing her hands, defendant entered the bathroom and turned off the light; he took off his pants and touched her waist and breasts. He unbuckled Michelle's pants and pulled them down a few inches. He pushed her onto the floor, then knelt with one knee on each side of her knees. He put his penis near her private parts. While he was kneeling over her, he said, "I want to hurt you." She kneed him in the stomach and ran out of the bathroom. She told the people at the front desk and

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1 All further statutory references are to the Penal Code, unless otherwise indicated.

the security guards she had been raped, because that was what defendant was trying to do. A PACT unit nurse and an investigator for the district attorney's office testified Michelle told them she had been raped; two security guards, a mental health clinician from the PACT unit, and a deputy sheriff testified Michelle reported only that defendant hurt her, touched her, tried to have sex with her, or forced himself on her.

A nurse conducted a sexual assault forensic examination of Michelle. She found a suction injury on the side of Michelle's neck. She took a swab of it to test any saliva present. The parties stipulated the DNA found on the swab was defendant's. No sperm was found in the vaginal swabs.

The court admitted the testimony of D.C., who testified that in 1991, when she was 15 years old, she was spending the night with defendant's sister and defendant or his brother provided her with alcohol. She got drunk and passed out. She woke up later and went to the bathroom; while she was in the hallway, defendant pulled her into a bedroom, pushed her onto the bed, pulled down her underwear, and had sexual intercourse with her against her will. The court also admitted evidence that defendant had a prior conviction of sexual penetration by a foreign object, specifically a finger (§ 289).

Defendant was found guilty of assault with intent to commit rape (§ 220) and was sentenced to 25 years to life in prison, plus 10 years for enhancements (§§ 667, subd. (a)(1), 667.6, subd. (a)). Defendant timely appealed.

DISCUSSION

I. Ineffective Assistance of Counsel

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has a right to the [effective] assistance of counsel"; that is, he has a right to "'the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 215 (*Ledesma*).) "The ultimate purpose of this right is to protect the defendant's fundamental right to a trial that is both fair in its

conduct and reliable in its result." (*Ibid*.) "Under this right, the defendant can reasonably expect that in the course of representation his counsel will undertake only those actions that a reasonably competent attorney would undertake" and "before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation." (*Ibid*.)

A claim of ineffective assistance has two components: (1) the defendant must show counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness under prevailing professional norms; and (2) the defendant must establish prejudice as a result. (*Ledesma*, *supra*, 43 Cal.3d at pp. 216, 217.) To show prejudice, "'[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*Id.* at pp. 217-218.)

A. Evidence of defendant's mental disorder

Defendant contends his trial counsel, John Missirlian, provided ineffective assistance because he failed to present any evidence of defendant's mental disease or disorder and failed to request jury instructions regarding the affect of mental disorder on the element of specific intent.

Evidence of a defendant's mental disease, defect, or disorder is not admissible to show the defendant lacked the capacity to form the mental state required for the offense with which he or she is charged. (§§ 25, subd. (a), 28, subd. (a).) Such evidence is admissible, however, to show whether the defendant actually formed the required intent or other mental state, when a specific intent crime is charged. (§ 28, subd. (a).) At the guilt phase of the trial, an expert may testify concerning the defendant's mental condition, but may not testify regarding the ultimate issue whether the defendant had actually formed the required intent at the time he acted. (§ 29; *People v. Nunn* (1996) 50 Cal.App.4th 1357, 1364.)

At trial, Missirlian offered no evidence of defendant's mental condition at the time the offense was committed. Defendant contends such evidence should have been submitted as evidence negating the element of specific intent to commit rape. According to the probation report, the original criminal proceedings against defendant were suspended pursuant to section 1368, and three doctors evaluated his competency. In December, 2006, two of them found him not competent to stand trial; the third believed he was competent. Defendant was committed to Patton State Hospital on May 8, 2007. His competency was found to be restored on June 27, 2007. The original case was dismissed; the complaint in this proceeding was refiled on October 29, 2007. The probation report also indicates defendant told the probation officer he hears voices and sees things, and he has had mental health problems all his life.

On the first day of trial, June 23, 2008, the court conducted a *Marsden* hearing (*People v. Marsden* (1970) 2 Cal.3d 118), after defendant requested new counsel be appointed for him. Defendant complained his attorney had not spent adequate time discussing his case with him; he also mentioned that Missirlian was supposed to have a doctor, a specialist, see him, but the doctor did not come and Missirlian did not communicate with defendant about it. The court questioned Missirlian about his work on the case; in response to a query about obtaining a specialist, Missirlian stated they had discussed "dealing with diminished capacity as it now stands, but in this case, because it's a general-intent crime, it would not be of any help to us in that respect."

Defendant asserts Missirlian had sufficient information concerning defendant's mental condition that he should have conducted a thorough investigation of the relevant facts and law, consulted a mental health expert, and presented evidence raising the issue in his defense. The record does not indicate whether, or to what extent, Missirlian investigated the facts or law relevant to the issue of defendant's mental state at the time of the offense. It is not clear whether he consulted any mental health experts to

determine whether defendant suffered from any mental impairment or disorder, or whether any such impairment may have affected him at the time of the offense.

Missirlian's explanation that he did not have a specialist examine defendant because the charged crime was a general intent crime suggests he did not make a rational and informed tactical decision based on adequate investigation of the applicable law, since assault with intent to commit rape is a specific intent crime. (*People v. Dillon* (2009) 174 Cal.App.4th 1367, 1383.) Regarding defense counsel's explanation for acts or omissions asserted to demonstrate ineffective assistance, the court in *People v. Pope* (1979) 23 Cal.3d 412, stated:

> "Where the record does not illuminate the basis for the challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a petition for habeas corpus. In habeas corpus proceedings, there is an opportunity in an evidentiary hearing to have trial counsel fully describe his or her reasons for acting or failing to act in the manner complained of. [Citations.] For example, counsel may explain why certain defenses were or were not presented. Having afforded the trial attorney an opportunity to explain, courts are in a position to intelligently evaluate whether counsel's acts or omissions were within the range of reasonable competence." (*Pope, supra*, 23 Cal.3d at p. 426.)

Here, Missirlian's explanation was not a full description of the reasons for his actions given in response to a petition for habeas corpus. Rather, it was a brief response to the court's question raised during the hearing of an oral *Marsden* motion. The court did not fully explore the extent of counsel's investigation of the facts and law relating to defendant's asserted mental disorder. We hesitate to find defendant has met his "heavy burden" (*Pope, supra*, 23 Cal.3d at p. 426, fn. 16) of demonstrating the deficient performance necessary for a claim of ineffective assistance of counsel based on such a cursory explanation.

Even if we were to find that defendant has shown deficient performance on the part of his trial attorney, however, defendant must also establish prejudice resulting from that deficient performance. This he has not done. Defendant has not identified anything

in the record that explains the nature or extent of any mental disease, defect, or disorder from which defendant suffered at the time of his offense. He has not shown that any mental disorder may have affected him at the time of the offense in such a way that he did not form the specific intent to commit rape. He has not demonstrated through the record that, had Missirlian investigated defendant's mental condition, he would have obtained evidence tending to show defendant was afflicted by a mental disorder that affected him at the time of the offense in such a way that he did not form the specific intent to commit rape. Consequently, he has not shown there was a reasonable probability that, but for Missirlian's deficient performance, the result of the trial would have been different. Defendant has not established that he was denied the effective assistance of counsel.

B. Admission of statements of defendant and the victim

Defendant complains that Missirlian did not move to admit "statements the victim made about following a man in Costco" and did not seek exclusion of statements made by defendant.

On appeal, contentions supported neither by argument nor by citation to authority are deemed to be without foundation and to have been abandoned. This court is not required to consider alleged error where the appellant merely complains of it without pertinent argument. (*Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 710.) Michelle testified to an incident in which she followed a man to his car at Costco. Defendant has not identified any statements about that incident he contends were not admitted but should have been. He has provided no argument in support of his contention that any such statements should have been admitted, or that counsel's performance was deficient because of a failure to introduce such statements at trial. The issue is deemed abandoned.

Regarding the exclusion of statements of defendant, defendant cites numerous authorities concerning involuntary confessions. No confession of defendant was admitted at trial. Defendant has not identified any statements by him that were admitted

at trial and that he contends his attorney should have sought to exclude. He presents no argument that any such statements were involuntarily made or inadmissible, or that Missirlian's performance as his attorney was deficient because he failed to seek exclusion of any such statements. The issue is deemed abandoned.

II. Evidence of Prior Sexual Offenses

Defendant contends the trial court violated Evidence Code sections 1101, 1108, and 352 by admitting evidence of defendant's prior sexual offenses. The trial court found the prior conviction of digital penetration and the prior incident involving a sexual assault on D.C. were admissible pursuant to Evidence Code sections 1101 and 1108; it then applied an Evidence Code section 352 analysis and found them more probative than prejudicial.

Evidence Code section 1101, subdivision (b), permits "the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." In actions in which the defendant is accused of a sexual offense, Evidence Code section 1108 permits the admission of evidence of the defendant's commission of another sexual offense if the evidence is not inadmissible pursuant to Evidence Code section 352. Evidence Code section 352 authorizes the court, in its discretion, to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Defendant's argument on this issue addresses only whether the prior offenses were admissible pursuant to Evidence Code section 1101. But the trial court also found they were admissible pursuant to Evidence Code section 1108, and defendant has not argued

the evidence should not have been admitted pursuant to that section. Defendant merely asserts his conclusion that the evidence did not qualify for admission under Evidence Code section 1108. He provides no explanation or supporting argument applying the law to the facts of this case to show how he arrived at that conclusion. He also presents no argument concerning how Evidence Code section 352 applies. Since defendant has made no argument supporting his contention that the trial court should not have admitted the prior offense evidence pursuant to Evidence Code sections 1108 and 352, we deem the issue abandoned and find no error.

DISPOSITION

The judgment is affirmed.

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HILL, J.

WE CONCUR:

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CORNELL, Acting P.J.

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POOCHIGIAN, J.